92-No.475

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

I.M.T.C., INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN ROSE

Law Offices of
Kullman, Inman, Bee, Downing
& Banta
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504)524-4162

COUNSEL FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Did the National Labor Relations Board exceed its authority in establishing bargaining units which, contrary to Board precedent, do not constitute either a craft unit or a clearly identifiable and functionally distinct group of employees?

2. Did the National Labor Relations Board exceed its authority in making bargaining unit determinations which require fragmented collective bargaining along craft lines by a construction industry employer who has heretofore operated with an integrated work force and without formal craft distinctions?

RULE 14.1(a) STATEMENT

Parties to the proceeding in the court whose judgment is sought to be reviewed are:

I.M.T.C., Inc. (has no parent or subsidiary companies)

National Labor Relations Board

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ORDERS AND OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, which is unreported, appears in (Appendix A). The relevant orders of the National Labor Relations Board issued in this case, unreported, are the Decision and Direction of Election (Appendix B), Order Denying Employer's Request for Review of the Regional Director's Decision and Direction of Election (Appendix C), Hearing Officer's Report on Determinative Challenged Ballots and Objection to Conduct of Election (Appendix D), Decision and Certification of Representative (Appendix E), and Decision and Order granting General Counsel's Motion for Summary Judgment (Appendix F).

JURISDICTION

The Fifth Circuit Court of Appeals entered its opinion and judgment on December 10, 1992. Petitioner files this Petition for Writ of Certiorari within 90 days of the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 9(b) of the Labor Management Relations Act of 1947, 29 U.S.C. §159(b), provides in pertinent part:

> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

STATEMENT OF THE CASE

In this case, I.M.T.C., Inc. (IMTC), a construction contractor, is contesting an order issued by the National Labor Relations Board (NLRB or Board), directing IMTC to engage in fragmented collective bargaining with two different labor unions which are seeking to represent subgroups of employees carved from an integrated work force.

IMTC is a general contractor which employed a fluctuating work force averaging approximately 230 employees during the relevant period. All nonsupervisory construction employees of IMTC are classified as either Mechanic "A" (highest skill level), Mechanic "B"

(somewhat less skilled), Helper "I" (unskilled assistance to mechanics), Helper "II" (unskilled assistance to mechanics), or Laborer (incidental unskilled work). Work crews usually consist of three to six employees from one or more of these classifications, working side-by-side and supervised by the same lead foremen. While crew members are generally assigned work so as to best utilize their particular skills,[1] all crew members are expected and do whatever work is required to successfully complete an assigned project. Thus, employees are not assigned work strictly along craft lines, and utilization of multiple skills and performance of overlapping job tasks by crew members occurs on a routine basis.

All employees within each classification receive the same pay and same benefits without regard to their particular dominant skill, and all members of each crew have the same lunch period and attend weekly "toolbox" safety meetings. The employees' orientation, personnel policy guide, and anti-drug policy apply equally to all employees. All employees are encouraged to attend cross-skill training programs for the purpose of broadening their abilities in varied skills, thereby making them more valuable in the composite crew.

Against this background of composite crews and undifferentiated mechanics and helpers, two labor unions filed petitions with the Board seeking to be certified as separate representatives of certain subgroups of employees who worked within IMTC's construction crews. Specifically, the Plumbers and Steamfitters Local 106, a/w United Industry of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada

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[1] The various skills utilized by IMTC include pipefitting, boilermaking, ironwork, driving, operating, millwright, carpentry, pipe welding, and roofing.

(Plumbers Local 106) sought to represent approximately 50 employees described as "pipefitters, pipe welders, and pipe helpers," and the International Union of Operating Engineers, Local 406, AFL-CIO (Operating Engineers Local 406) sought to represent approximately 12 employees described as "operating engineers." IMTC contended that the only unit appropriate for bargaining is an overall unit consisting of all construction workers employed by the Company.

Following a hearing, the Board's Region 15 Director issued a Decision and Direction of Election on January 12, 1990, ordering two elections in two separate units consisting essentially of the subgroups which had been requested by the unions (Appendix B). IMTC filed a Request for Review which was denied by the Board (Appendix C), and elections were held in the two separate voting units. A sufficient number of ballots were challenged to effect the results in each election. Both IMTC and the Plumbers Local 106 filed objections to the conduct of the election, with IMTC again asserting, among other things, that the bargaining units had been improperly constituted.

Following a hearing on the challenged ballots and objections, the Hearing Officer issued a Report on Challenged Ballots and Objections (Appendix D) in which IMTC's objections to the elections were overruled, and rulings were made on various challenged ballots. IMTC filed exceptions to the Report with the Board, which were denied. Accordingly, on February 20, 1991, based upon a majority of votes counted having been cast for the unions in each unit, the Board certified the Plumbers Local 106 and the Operating Engineers Local 406 as the exclusive collective bargaining representatives of each respective subgroup of employees (Appendix E).

Thereafter, IMTC refused to bargain with either of the unions in order to challenge the appropriateness of the bargaining units certified by the Board. Upon the filing of an unfair labor practice charge by the unions, the Board's General Counsel issued a complaint, and the Board subsequently granted General Counsel's Motion for Summary Judgment on June 11, 1991, finding an unlawful refusal to bargain on the part of IMTC (Appendix F). IMTC thereafter appealed to the Fifth Circuit Court of Appeals pursuant to 29 U.S.C. §160(f), asking that the Board's bargaining unit determinations and ruling on objections be reviewed, and that the Board's order requiring IMTC to bargain with the unions be set aside. The Board cross-petitioned for enforcement of its order. The Fifth Circuit denied IMTC's Petition for Review, and granted the Board's Petition for Enforcement of its order on December 10, 1992 (Appendix A).

Petitioner IMTC respectfully suggests that this case raises an important question concerning the propriety of the Board's decision to require fragmented collective bargaining along traditional craft lines by a construction industry employer who has heretofore successfully operated with an integrated work force and without formal craft distinctions.

REASONS FOR GRANTING THE WRIT

I. The NLRB's Bargaining Unit Determinations, As Enforced By The Court of Appeals, Seriously Deviated From Board Precedent.

The Board has long held that construction industry bargaining units may be appropriate on the basis of "craft," or on the basis of a unit which constitutes "a clearly identifiable and functionally distinct group of

employees." *Longcrier Company,* 277 NLRB 570 (1985); *Atlantia Division of S. J. Groves and Sons Company,* 267 NLRB 175 (1983); *Brown & Root, Inc.,* 258 NLRB 1002 (1981). Here, the Board found that the respective subgroups of employees constituted appropriate craft units. (Decision and Direction of Election, Appendix B, p. B-9.) IMTC respectfully submits, however, that the bargaining units certified by the Board do not meet the Board's traditionally applied criteria for a craft unit. Furthermore, the traditional criteria for a "clearly identifiable and functionally distinct group of employees" are likewise not present in this case.

A. Craft Unit

Under Board precedent, it is not sufficient for the recognition of a craft unit that a group of skilled employees simply spend a majority of their time performing their dominant skill. *Longcrier Company, supra* at 572. Rather, the Board has heretofore required that craft units satisfy certain criteria, including: (a) existence of an apprenticeship program; (b) existence of journeymen certification requirements; (c) utilization of helpers who are part of an apprenticeship program; (d) assignment of work in accordance with strict jurisdictional or craft lines; and (e) separate craft supervision. In the instant case, however, *not a single one of these criteria is present.*

1. *Apprenticeship requirement.* The existence of an apprenticeship program has been a core requirement for craft units found appropriate by the Board. *See, Longcrier Company, supra; Proctor and Gamble Paper Products Company,* 251 NLRB 492 (1980); *Denver Heating, Piping and Air Condition Contractors,* 99 NLRB 251 (1952). IMTC has no apprenticeship program and provides no on-the-job craft training. (See Decision and Direction of Election, Appendix A, p. B-7). Moreover, upgrade training made available

through a builder's association is voluntary and can be utilized by employees to cross-train into other skill areas. Such voluntary cross-training of employees has been found by the Board to militate against the existence of a craft unit. *See, Brown & Root, supra* at 1003; *Proctor and Gamble, supra* at 493.

2. *Journeymen certification requirement.* In the absence of journeyman status or certification, the Board has traditionally refused to find a craft unit. *See, Longcrier Company., supra; Brown & Root, Inc., supra; Proctor and Gamble Paper Products Co., supra; Pervel Industries, Inc.*, 163 NLRB 1037 (1967); *Erie Marine Division*, 195 NLRB 815 (1972). Here, the Board found a craft unit despite the fact that IMTC has no journeyman certification or license requirement for the employees it hires.

3. *Helper apprenticeship program.* The Board has declined to include helpers in a craft unit where the helpers are not part of an apprenticeship program. *See, Brown & Root, Inc., supra.* Deviating from this precedent, however, the Board included pipe helpers in the unit of "pipefitters, pipe welders, and pipe helpers," even though there was no evidence that any helper is in any apprenticeship program.

4. *Craft assignment.* In order to find a craft unit, the Board has required that work assignments be made following strict jurisdictional or craft lines. *See, Brown & Root, Inc., supra.* Here, the record is replete with evidence that work assignments are not made along strict jurisdictional or craft lines. While employees obviously are predominantly assigned to those tasks for which they are most skilled to perform, employees regularly perform work outside their dominant skill. A number of employees perform a *substantial* amount of work outside their dominant skill. (E.g., W. R. Burns, 70% operating, 30% pipefitting; J. R. Citizen, 50% operating, 30-40% pipefitting; B. R.

Demeritt, 40% pipefitting, 40% operating; J. C. Matney, 50% pipefitting, 50% operating; R. Livingston, 60% mechanic, 40% operating). See Appendix D, pp. D-7, D-8, D-9, D-22. Again, the Board's finding of a craft unit even though employees are not assigned along strict craft lines is a marked departure from past precedent.

5. *Supervision.* Finally, the Board has routinely limited craft unit determinations to cases where craftsmen have separate craft supervision. *See, A. C. Pavement Stripping Co.*, 296 NLRB 206, 209 (1991); *ECM, Inc.*, 264 NLRB 1077 (1982); *Dow Chemical Co., Rocky Flats Division*, 202 NLRB 17 (1973); *E. I. Dupont deNemours and Co.*, 162 NLRB 413, 418 (1966). Here, IMTC does not have separate supervision for employees performing either operating or pipefitting work, but rather maintains composite cross-craft crews in which all employees in the crew, regardless of their dominant skill, are supervised by a common supervisor.

Thus, it is clear from the record that the crucial factors which the Board has required in order for a craft unit to be found appropriate are not present in the instant case. The Board's unit determination in this case simply *cannot* be reconciled with its prior decisions regarding craft units. Accordingly, the Board's order represents an insufficiently explained deviation from Board precedent.

B. Functionally Distinct Group of Employees

The Board's order reflects an intent to establish a craft unit. (See Decision and Direction of Election, Appendix B, p. B-9.) As discussed above, the Board's "craft unit" determination is in serious conflict with prior Board decisions. An alternative basis upon which the Board could have made the unit determination (but did not) would have

been on the basis of whether there exists a "clearly identifiable and functionally distinct group of employees." *See, Atlanta Division of S. J. Graves and Sons company, supra; Brown & Root, Inc., supra.* The record facts, however, cannot support a unit determination on this basis, either.[2]

Even though IMTC undisputedly employs many employees with identifiable dominant skills, virtually every other factor which the Board has relied on in the past to support a finding of "clearly identifiable and functionally distinct group of employees" is absent here. There are no separate job classifications or payroll designations by craft or dominant skill. There is no separate department or other unit organized by craft or dominant skill. There is no separate supervision for any particular craft or dominant skill group. There are no craft-specific work teams, inasmuch as all work teams are constituted along cross-craft lines. There is no geographic separation among employees in the various dominant skill groups. There are no differences in the wages received by employees in the various dominant skill groups. There are no differences in benefits received by employees in the various dominant skill groups. There is no difference in the hours worked and the facilities used by employees in the various dominant skill groups. There is no difference in the labor relations policies applied to the various dominant skill groups. There are no differences in the terms and conditions of employment applied to the various dominant skill groups. And finally, there is considerable functional integration of the work performed by the various skill groups, as well as varying degrees of overlapping duties. Under these circumstances, the Board has in the past refused to carve out units for

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[2] The Court of Appeals did not specifically articulate whether it was affirming the Board's decision on the basis of "craft unit" or "clearly identifiable and functionally distinct group of employees."

which, as here, the only common characteristic of the group is the fact that the employees in the requested unit "happen to spend a majority of their time" performing similar skills. *See, Longcrier Company, supra; Atlanta Division of S. J. Groves and Sons Co., supra; Brown & Root, Inc., supra.*

IMTC is mindful that the NLRB has considerable latitude in making bargaining unit determinations, and that the NLRB's judgment should be disturbed by the courts only where its unit determinations are arbitrary or unsupported by substantial evidence. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 83 L. Ed 2d 986, 105 S. Ct. 984 (1985); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491, 91 L. Ed 1040, S. Ct. (1947). However, IMTC respectfully urges that the Board's failure to adhere in this case to the principles which it has heretofore followed reflects arbitrariness and a lack of substantial supporting evidence. Alternatively, at the very least, the Board has failed to provide "articulated reasons" for the distinctions between this case and the virtually indistinguishable cases in which the Board has ruled to the contrary. *See, NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-43, 13 L. Ed 2d 951, 85 S. Ct. 1061 (1965).

II. The NLRB's Decision To Carve Out Separate Craft Units From A Homogeneous And Functionally Integrated Workforce Undermines, Rather Than Fosters, Federal Labor Policy.

One of the overriding purposes of the National Labor Relations Act is to foster industrial peace and the stabilization of labor relations in the workplace. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794, 108 L. Ed. 2d 801, 110 S. Ct. 1542 (1990); *Brooks v. NLRB*, 348 U.S. 96, 99 L. Ed. 125, 75 S. Ct. 2225 (1954). IMTC respectfully urges that the Board's deviation from its past precedent in

this case, and the precedent which this deviation establishes, does not foster, but rather undermines, stable labor relations.

Viewed from a workplace standpoint, the NLRB's separate certifications of operators and pipefitters/pipewelders — apart from other employees with similar skills, common supervision, identical working conditions, and common economic interests — will likely generate factionalism, resentment, and dispute where none presently exist. *See, Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining*, p. 69. This type of potentially disruptive environment is inevitable where, as here, small functionally integrated work crews will be comprised of both union and non-union employees on the same job. Moreover, employees working side-by-side with each other will potentially be subject to different wages, different benefits and different work rules. It is difficult to imagine conditions which could be less conducive to team work, cooperation, good employee morale, and industrial peace.

Furthermore, from a collective bargaining standpoint, other difficulties will necessarily flow from these carved out units. Given that a number of IMTC's employees perform various cross-craft skills, there will inevitably be disputes simply attempting to identify which employees are included in which unit, and which employees are in no unit at all.[3] Similarly, jurisdictional issues are likely to be raised by the representative unions which would be nonexistent in a company-wide unit. Likewise,

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[3] In this connection, approximately 30 of the individuals voting in the elections were challenged due to dispute among the parties as to which unit, if any, those individuals properly belonged. *See* Hearing Officer's Report on Determinative Challenged Ballots and Objections to Conduct of Election, Appendix D.

supervisors and foremen will be called upon the administer and comply with multiple collective bargaining agreements covering employees working side by side. IMTC submits that such potential issues and problems would largely be obviated, and union-management relations could proceed with much greater stability, if the appropriate unit was constituted in accordance with the principles the Board has adhered to in the past. *See, Brown & Root, Inc., supra.* Moreover, not only does the Board's decision in this case adversely impact Petitioner's business, it creates precedent which will have far ranging disruptive consequences for the construction industry as a whole.

CONCLUSION

The NLRB's unit determinations in this case, as enforced by the Court of Appeals, constitute a significant and unexplained departure from prior decisions and policies. Moreover, the decision of the NLRB to carve out separate craft units from a homogeneous and functionally integrated work force undermines, rather than fosters, stable labor relations.

For these reasons, this case merits review of the Court.

Respectfully submitted this ____ day of March, 1993.

STEPHEN ROSE

Law Ofices of
Kullman, Inman, Bee, Downing
& Banta
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

COUNSEL FOR PETITIONER

CERTIFICATE

I hereby certify that I have this ____ day of March, 1993, caused to be served, three (3) copies of the above and foregoing Petition for Writ of Certiorari and Appendix by United States mail, postage prepaid, upon all parties required to be served. Service has been made upon the following:

William M. Bernstein, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570

and

Aileen A. Armstrong, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570